

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MICHAEL S. ARGENYI,)	
)	
Plaintiff,)	8:09CV341
)	
vs.)	Omaha, Nebraska
)	August 20, 2013
CREIGHTON UNIVERSITY,)	
)	
Defendant.)	

VOLUME I
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LAURIE SMITH CAMP
CHIEF UNITED STATES DISTRICT JUDGE AND A JURY

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Proceedings recorded by mechanical stenography, transcript
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A-P-P-E-A-R-A-N-C-E-S

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1 (At 8:35 a.m. on August 20, 2013, with counsel for the
2 parties present in chambers, the following proceedings were
3 had:)

4 THE COURT: Well, there have been a few more motions
5 filed since five o'clock last night, and I can't say that I've
6 had a chance to digest them all. You've submitted
7 stipulations at filing 353, and so I accept your stipulations.

8 There is a motion for clarification at filing 349. And I
9 understand that that is just a request that the order in
10 limine regarding reference to pretrial matters and precluding
11 the plaintiff from referring to pretrial matters will also
12 apply to the defendant and the defendant's reference to
13 pretrial matters. And that seems fair and reasonable.

14 MR. MOORE: Yes, your Honor.

15 THE COURT: And there's no objection to that?

16 MR. MOORE: No.

17 THE COURT: So plaintiff's motion for clarification
18 at filing 349 is granted.

19 (Phone rings.)

20 THE COURT: Excuse me, I have to put that on Do Not
21 Disturb. And Janet has caught it, but I will put it on Do Not
22 Disturb.

23 So that leaves us then with a motion for reconsideration
24 regarding Creighton's undue burden defense as it relates to
25 interpreters during the plaintiff's M1 and M2 years. And this

1 motion appears at filing 352.

2 And of course, the plaintiff is making a distinction
3 between use of interpreters and use of CART services. And the
4 plaintiff appears to acknowledge that the defendant is
5 asserting and has asserted in the past the undue burden
6 defense with respect to the CART services used by the
7 plaintiff in M1 and M2.

8 And as I read this motion, the plaintiff wants the
9 defendant precluded from asserting an undue burden defense
10 with respect to interpreters in the clinical setting.
11 Plaintiff's counsel is shaking her head. And again we're
12 referring to filing 352. And I will ask counsel for the
13 plaintiff then to clarify for me.

14 MS. VARGAS: I'm sorry, your Honor.

15 That motion actually deals with the assertion of undue
16 burden with respect to qualified interpreters for M1 and M2
17 for the reason that the defendant has argued in their brief
18 that they will not be asserting undue burden with respect to
19 interpreters for M1 and M2.

20 THE COURT: And what distinction are you drawing
21 between interpreters and CART services? With respect to
22 interpreters, are you talking about interpreters using the
23 cued speech to assist the plaintiff in lip-reading during
24 lectures during M1 and M2?

25 MS. VARGAS: Defendant has asserted and maintained

1 that it will not argue the affirmative defense of undue burden
2 with respect to what it calls qualified interpreters. I
3 certainly understood that to mean oral sign-supported
4 interpreters. There aren't any cued speech interpreters in
5 Nebraska.

6 THE COURT: Okay. And you may need to clarify the
7 difference between the cued speech interpreters and the oral
8 sign-supported interpreters because I understand both of those
9 are different from American Sign Language interpreters.

10 MS. VARGAS: That's right.

11 THE COURT: Okay. I'm learning something here all
12 the time.

13 And Mr. Moore, do you want to explain just what the
14 defendant's assertion is regarding undue burden --

15 MR. MOORE: Sure.

16 THE COURT: -- in M1 and M2 years.

17 MR. MOORE: Sure. Well, with regard to those areas
18 in which, for M2, Creighton University offered interpreters in
19 the lecture setting, a didactic lecture setting, that alone
20 we've alleged does not create an undue burden on Creighton.
21 Indeed Creighton offered those after it received
22 Dr. Thedinger's letter saying the FM system was ineffective.

23 However, I don't think the defendant is taking the
24 position that, number one, that what Mr. Argenyi requested in
25 total for M1 and M2, which would be interpreters not only in

1 that setting but in clinics and in labs and in those other
2 areas, if you look at that as a whole, Creighton believes it
3 can still assert and will still assert the undue burden
4 defense. Overall I think it's fair for the jury to hear if
5 Creighton University granted Mr. Argenyi the requests that he
6 wanted, the specific requests that he wanted, over a four-year
7 period, how much that would be as compared to the benefit that
8 he's getting.

9 So, yes, we do intend to make arguments to the jury that
10 talks about how much the cost would be if we granted the
11 specific requests that he had because from Creighton's
12 perspective, we understood that either he got all of those or
13 it was insufficient. So we believe that's relevant and the
14 jury should hear that on the undue burden.

15 THE COURT: Does that explanation assist the
16 plaintiff, or does the plaintiff still contend that the
17 defendant is now raising a defense that was earlier waived?

18 MS. VARGAS: Our concern was that it appeared in the
19 order that the defendant would be allowed to assert undue
20 burden with respect to the provision of qualified
21 interpreters.

22 And in response to discovery and in briefing, the
23 defendant conceded that it was not an undue burden to provide
24 qualified interpreters. That was never supplemented, so there
25 was no reason to conduct further discovery on that.

1 That they're asserting undue burden with respect to CART
2 I think is a separate issue. We're just in this motion
3 addressing the fact that the defendant has waived and conceded
4 and stated that it will not assert undue burden with respect
5 to the provision of qualified interpreters.

6 THE COURT: So Mr. Moore's explanation alleviates
7 your concern.

8 MS. VARGAS: Provided he doesn't actually assert that
9 argument. We've had an issue ongoing with this litigation
10 with arguments such as issues related to direct threat and
11 interpreters inhibiting patient care that have been waived and
12 then come back up, and we do not want that to happen with the
13 jury.

14 THE COURT: Okay. I appreciate the communication
15 between counsel. I don't think that there is a conflict in
16 your actual positions.

17 And so, what I am going to do is deny filing number --
18 the motion at filing number 352 without prejudice. And if it
19 appears that the undue burden defense is being raised in a
20 manner that is inconsistent with Creighton's earlier
21 representations and waivers, then you can certainly bring that
22 matter to my attention and we'll address it at that time.

23 MS. VARGAS: Thank you, your Honor.

24 THE COURT: I think that that takes care of the
25 currently pending motions as of 8:45.

1 MR. MOORE: Don't hold your breath.

2 THE COURT: Let me just talk a little bit about how
3 things are likely to proceed.

4 And again, I apologize for the fact that we need to
5 interrupt these proceedings tomorrow for this patent hearing.
6 That matter was scheduled many, many months ago, and
7 apparently was the only date that the lawyers, who are coming
8 in from all across the country, could all come in. So the
9 courtroom deputy had locked that in and promised them that
10 date.

11 Then of course, when this matter came back from the
12 Eighth Circuit, we wanted to give it priority as well to bring
13 it to trial because as you know, the case has been pending for
14 about three years now, since -- is it Mr. Ar-gen-yee?

15 MS. VARGAS: Ar-gen-ee.

16 THE COURT: -- since Mr. Argenyi brought the action.
17 And we don't want him to have to wait any longer than
18 necessary to get the issues resolved.

19 So we set it at the earliest possible time. And we will
20 select the jury this morning. I understand that 21 jurors
21 have arrived. One juror had a situation where his wife was in
22 an automobile accident, and so he's on his way to the
23 hospital, and he's been excused.

24 And whenever we have an odd number of jurors, you get an
25 even number of strikes, both sides get the same number, and

1 then I take off whoever is remaining at the bottom of the
2 list. So, I take the last strike, but I exercise no
3 discretion in taking that last strike.

4 We will plan to have a jury of 12. But if for some
5 reason someone gets sick or unable to come, then we'll proceed
6 with the number that we have available.

7 As you know, I do generally the bulk of the voir dire.
8 And usually we allocate 10 minutes per side for voir dire, 20
9 minutes per side for opening statement, and 30 minutes per
10 side for closing argument.

11 But those time limitations are flexible. And if you
12 believe in this case that you require more time than that, let
13 me know, and this is the point where we negotiate this.

14 Sometimes lawyers come in from California or New York,
15 and they think they're going to spend days in voir dire. And
16 we just don't do that here. That's not the way we do
17 business. So we're just trying to get a fair jury. We're not
18 trying to ensure that anybody wins or loses the case in voir
19 dire.

20 So I will ask the plaintiff, first, if those time limits
21 are adequate or if you believe that you need a little bit more
22 in any one of those three areas.

23 MS. VARGAS: I certainly think the time is adequate,
24 your Honor, for the voir dire. We think that the 20 and 30
25 minutes are also probably sufficient for opening and closing.

1 THE COURT: Okay. Very good.

2 And the defense?

3 MR. MOORE: I wouldn't mind five more minutes for
4 voir dire. I think the opening and closing I'm absolutely
5 fine with those. I think there are -- this will be the first
6 time the jury hears this, and there's some -- as we discussed
7 this morning, there are some complex issues as to what's going
8 on as far as the different types of speech and those kind of
9 things.

10 And there's a broad base of folks who could have been
11 impacted by something like that; moreover with the article
12 that appeared in the World-Herald, I want to be sure we
13 understand who saw what and who read what. I'd request five
14 more minutes, 15 minutes for voir dire.

15 THE COURT: That's fine. Both sides get 15 minutes
16 for voir dire.

17 The courtroom deputy will help you with the use of
18 lights. We have lights out there like we have at the Nebraska
19 Supreme Court or Nebraska Court of Appeals. So the light's
20 green when you have time to talk; and it's red when your time
21 is up.

22 And then it's up to you how you want the yellow light to
23 come on for a warning. If you want a five-minute warning or
24 two-minute warning, just let the courtroom deputy know, and
25 she should set that up for you.

1 And they'll be set up on the bench. Oftentimes we have
2 them at the podium, but you may not want to use a podium, so
3 we'll have them where they're visible to everybody at the
4 bench.

5 MR. MOORE: So I understand, are we at table during
6 voir dire or...

7 THE COURT: You can be where you want to be.

8 MR. MOORE: Okay.

9 THE COURT: And that's a good thing to discuss at
10 this juncture because I want to make sure that everybody has a
11 fair opportunity to be heard and that nobody gets blocked by a
12 podium. We are not too formal about standing up whenever you
13 speak. We just want to make sure that you are heard and that
14 you can communicate in the courtroom.

15 So if you stay by a microphone at all times, that's the
16 most important thing, especially since we are having not only
17 the real time, but the CART services provided to the plaintiff
18 and to counsel. We need to make sure that the court reporters
19 can hear everything that's being said; and that the jury, of
20 course, hears everything.

21 MR. MOORE: Were I to leave counsel table, which I
22 would prefer to do at least for opening and closing, normally
23 I would stand -- the jury's here, I would stand by the table
24 there. I'm not sure how I can be picked up by a microphone.
25 Normally if someone is standing at the podium, the microphone

1 is in front of them.

2 THE COURT: Show me where you're --

3 MR. MOORE: The jury box is here and here's our
4 table. Normally I would stand right there and put my notes on
5 that table.

6 THE COURT: So the bench is up here and that's where
7 you want to be?

8 MR. MOORE: So I'm -- I would like to be able to do
9 that and I'm trying to figure out how to be close to a
10 microphone.

11 THE COURT: As long as you're not moving around --

12 MR. MOORE: Okay.

13 THE COURT: -- we can turn that mike toward you and
14 that ought to be able to pick up the sound fine. And Brenda
15 is nodding.

16 MR. MOORE: Very good.

17 THE COURT: Sometimes we have lawyers who like to
18 wander.

19 MR. MOORE: Yes, right.

20 THE COURT: Then the sound comes in and out and
21 that's what we want to avoid.

22 MR. MOORE: Fortunately I talk with my hands so I
23 can't move at the same time. So we should be okay with that.

24 THE COURT: We've had some lavalier mikes or lapel
25 likes used from time to time, but I think that this is the

1 better option.

2 MR. MOORE: Very good. Thank you.

3 THE COURT: There are certain things we try to avoid
4 saying in the courtroom because it leads to redaction issues.
5 And the things you want to try to avoid, which shouldn't be a
6 problem in this case, are Social Security numbers, bank
7 account numbers, exact addresses -- so rather than asking
8 somebody "where do you live," and then they spit out their
9 exact home address, you might say, "what town are you from,"
10 or something along those lines -- full names of minor children
11 and birth dates, exact birth dates. And these are for obvious
12 reasons, but things get uploaded onto the Internet, and we
13 just want to protect people's privacy and avoid identity
14 theft.

15 As far as schedule is concerned, I'll be going down to
16 meet with the jury for orientation at nine o'clock, and then
17 you're free to set up in the courtroom.

18 Our courtroom deputy this week is Mary Roundtree. And
19 she'll be bringing up the jurors and getting them seated for
20 the voir dire.

21 We'll try to start that around 9:30. We never go for
22 longer than two hours without a break, so we take a
23 mid-morning break, we take a noon break that will be at least
24 an hour, and a mid-afternoon break. We won't get that far
25 today because we're going to stop after voir dire and

1 preliminary instructions.

2 And then we'll start again on Thursday morning at nine
3 o'clock. And we have all day Thursday and all day Friday. We
4 don't have Monday because I do sentencings all day Monday.
5 That's just the way our schedule works. So we'll start again
6 then Tuesday morning at nine o'clock, and proceed until we're
7 finished.

8 And I understand your estimate was about four days; is
9 that still --

10 MR. MOORE: Yes.

11 THE COURT: Okay. And in the voir dire, one thing I
12 go through is the list of witnesses who may be called. And I
13 plan to go through all the names that you've listed for me.
14 If you know that somebody is not going to be called, you're
15 welcome to tell me. But otherwise I'll read all the names and
16 inquire if anyone knows anyone.

17 Brenda and Rachel, anything I'm forgetting to cover?

18 LAW CLERK: Not that I can think of.

19 MS. VARGAS: I do have a few questions.

20 First of all, with respect to one of the jurors in the
21 pool, there is a Creighton University pharmacology professor
22 who is among the jury pool. And I just wanted to ask if her
23 time might be more appropriately spent on another jury.

24 THE COURT: Well, I think --

25 MS. VARGAS: In deference --

1 THE COURT: That's probably right. But -- and this
2 was brought to my attention, too. But I don't like to
3 interject myself early on in the jury selection process by
4 saying oh, let's boot this person, this person's obviously
5 going to be conflicted out.

6 I think it's a better practice in the interests of
7 justice to have the people appear and explain their potential
8 conflict. And then if there's a request by counsel that the
9 person be excused for cause, then I'll excuse them. And you
10 don't have to waste a peremptory strike.

11 MS. VARGAS: Your Honor, I'm actually more concerned
12 about the potential for tainting the jury pool, given the
13 degree of connection, that it's a pharmacology professor for
14 the defendant, and the defendant's being sued with respect to
15 a professor's -- well, professors will be testifying. And my
16 concern is what she might say to other jurors or in the
17 presence of other jurors that would really taint the rest of
18 the pool to no huge benefit.

19 THE COURT: All right. So you're moving at this
20 point in time to strike this juror for cause?

21 MS. VARGAS: Yes, your Honor.

22 THE COURT: Any objection?

23 MR. MOORE: I would say yes, your Honor. I don't
24 think we've had an opportunity to talk with her. And I think
25 we have to understand that she can't be a fair and impartial

1 juror.

2 I think there's some risk on our side. She's an employee
3 of the pharmacy school. There's some risk on our side that
4 she may not like Creighton, I don't know. But I think in the
5 interests of justice that we should at least have the
6 opportunity to talk to her.

7 THE COURT: And that's the standard process that we
8 use. I've never -- I can't remember ever striking a juror
9 from the pool before we went into the voir dire process.

10 What I will do is downstairs in the orientation that I
11 give, I will caution the jurors at that point in time not to
12 discuss anything among themselves about the case or about
13 their own employment or personal lives so that we limit any
14 potential discussion among the jurors.

15 And then certainly during the voir dire process, if you
16 want to inquire about whether anybody has talked to this juror
17 before the trial has begun, you can inquire about that.

18 We've had people who have ended up on juries that I never
19 thought would end up on juries because nobody has either asked
20 to strike them for cause or nobody has exercised a peremptory
21 strike, and they've ended up being fair jurors.

22 So I don't want to jump the gun on this. But, that much
23 I will do during the orientation. I'll caution the jurors not
24 to visit with each other either about the case or about their
25 own backgrounds.

1 And you have some other things?

2 MS. VARGAS: I'm sorry, I'm from Maryland, so forgive
3 me for not knowing the process as well for jury selection.

4 Would you be able to help me understand a little bit more
5 about how you'll be conducting voir dire and how you'd like us
6 to handle follow-up questions we have -- and at some point
7 you'd like us to raise our objections -- so that we don't
8 interrupt your questioning, but we ask at an appropriate time.

9 THE COURT: Well, when I -- sometimes it's obvious
10 during my portion of the voir dire that someone is not going
11 to be able to be a fair and impartial juror. And at that
12 juncture, generally what I've done is I've looked to counsel
13 and I've said, "Is there a request to excuse this juror for
14 cause," so that I'm not booting them.

15 And if for any reason you feel that you don't want to
16 move to strike a juror for cause in front of the jury, but you
17 want to do it more discreetly, then we can have a sidebar.
18 You can just say, "I'd request a sidebar, your Honor," and
19 we'll do a sidebar. And then you can say, "Yes, I'd please
20 like to strike this juror for cause." And that way you don't
21 have to be concerned that anybody on the jury is going to
22 think that you're mean by striking the person.

23 MS. VARGAS: Thank you.

24 THE COURT: And at any time if you want to be heard,
25 it's not going to offend me if I'm in the voir dire process

1 and you stand, I'll recognize you, and at that time you can
2 either make your motion or request a sidebar.

3 And then you'll also have plenty of opportunity during
4 your own voir dire. You can follow up with additional
5 questions and then you can make your motion or request a
6 sidebar.

7 MS. VARGAS: To make sure I understand, during the
8 attorney voir dire, would you like us to make our -- any
9 motions we might have during our time or save them for the end
10 of our time? How would you like us to handle that?

11 THE COURT: Generally the lawyers make their motions
12 during the voir dire as it becomes apparent that somebody is
13 not going to be fair and impartial. And then they'll just
14 turn to me and say, "Your Honor, I would request that this
15 juror be excused from serving on this panel."

16 And I might follow up with a few more questions if I
17 think it's possible that the juror could be fair and
18 impartial, but oftentimes I agree. But I'm not usually the
19 one who says, you know, "You can leave." I usually defer to
20 the lawyers and get a request from one or both of the lawyers
21 to excuse the juror.

22 MS. VARGAS: Thank you.

23 I think the other question I had, are there any limits
24 that your Honor would set on what counsel can say about the
25 case in terms of not giving opening statements during attorney

1 voir dire?

2 THE COURT: And that's always an issue. Some
3 people -- I was a lawyer, too. Sometimes I would use voir
4 dire as an opportunity to plant the seeds about what my case
5 was about and try to persuade people that I had a good case.

6 Yeah, if there's -- if you start making opening statement
7 during the voir dire, and there's an objection, I'm likely to
8 sustain the objection.

9 And one clue is when, instead of asking a question of the
10 jury panel, a lawyer begins a narrative. And that's when we
11 usually see the objection. And then I may say, "Sustained.
12 Counsel, please ask a question of the jury."

13 MS. VARGAS: Thank you.

14 MS. DeLAIR: I just have one question, your Honor.
15 And I'm not sure if this is the appropriate time, but
16 plaintiff would like to make a motion so that the witnesses
17 are sequestered during the trial.

18 THE COURT: This is a good time to do that and I
19 usually try to remember to ask about that. And I assume
20 that's reciprocal?

21 MR. MOORE: We would make the same motion, all
22 witnesses, including the expert witnesses, be sequestered.

23 THE COURT: All witnesses will be sequestered. We
24 will -- it will be reciprocal. We will post a sign on the
25 door. And I ask counsel to help me to enforce that by warning

1 their witnesses not to come in until it's their time to
2 testify.

3 And if you see somebody coming in who shouldn't come in,
4 please bring that to my attention because I don't know what
5 your witnesses look like.

6 Anything else?

7 MS. DeLAIR: One more question, your Honor, about
8 possibly preadmitting the exhibits that both parties have
9 stipulated to.

10 THE COURT: Sometimes this is done at the pretrial
11 conference, but it was not done here.

12 Let's take a moment to do that. I'd be happy to do that.

13 MR. MOORE: Yes, just a second.

14 THE COURT: I'm looking at the joint trial exhibit
15 list, filing 286. And is this the most recent one?

16 MR. MOORE: I believe so, your Honor. I don't have
17 the filing number in front of me.

18 LAW CLERK: It's the one both parties submitted with
19 their exhibit binders, so -- unless that's changed.

20 MR. MOORE: That should be correct.

21 THE COURT: Very good.

22 So you're asking me to go ahead and receive into evidence
23 the exhibits that are marked as offered but where there is no
24 objection noted. Is that fair?

25 MS. VARGAS: Your Honor, there are four exhibits, I

1 believe they're number 16 through 19 that were covered already
2 by your Honor's ruling on the stipulations. Those are the
3 letters from Dr. Backous and Stacy Watson to the defendant.
4 And we were able to agree among ourselves that we would not
5 have any objection to those documents being admitted, and they
6 were part of the stipulations.

7 MR. MOORE: That's 16 through 19; yes, we agree, your
8 Honor.

9 THE COURT: All right. 16 through 19 are received.

10 MR. MOORE: From defendant's point of view, there's
11 several exhibits that there are no objections noted to on the
12 trial exhibit list that we'd like to -- we can just offer them
13 at this time. And that would be 1, 2 -- I'm sorry, 1 through
14 9, 11 through 13, 20, 34 and 35, 203, and 213.

15 MS. VARGAS: Your Honor, I apologize. I don't
16 actually have that exhibit list in here with me. Is it
17 possible that we could address this Thursday morning before
18 opening statements?

19 THE COURT: That's fine with me.

20 MR. MOORE: If we could deal with it now, I'd rather,
21 as we prepare for the first day and opening. That will help
22 guide us with regard to what we can say in opening. I don't
23 want to make any promises to the jurors that...

24 THE COURT: I'll tell you what, this will be easy.
25 What we're going to do is I'm going to make you a copy of

1 mine.

2 (Off-the-record discussion had.)

3 THE COURT: Just to review, the defendant is offering
4 first Exhibits 1 through 9. Any objection?

5 MS. VARGAS: We have no objection, your Honor.

6 THE COURT: Exhibits 1 through 9 are received.
7 Defense is offering 11 through 13. Any objection?

8 MS. VARGAS: No objection, your Honor.

9 THE COURT: 11 through 13 are received.
10 Exhibit 20.

11 MS. VARGAS: We have no objection, your Honor.

12 THE COURT: Exhibit 20 is received.

13 Exhibits 34 and 35.

14 MS. VARGAS: We have no objection.

15 THE COURT: 34 and 35 are received.

16 Exhibit 203.

17 MS. VARGAS: No objection.

18 THE COURT: 203 is received.

19 And Exhibit 213.

20 MS. VARGAS: No objection.

21 THE COURT: Exhibit 213 is received.

22 Does the plaintiff wish to offer any exhibits into
23 evidence at this time that you think the defense has no
24 objection to?

25 MS. VARGAS: Not at this time, your Honor. Thank

1 you.

2 THE COURT: Very good.

3 Anything further?

4 MR. MOORE: A couple questions, your Honor. And
5 again this is in preparing for Thursday. If the plaintiff
6 calls one of our witnesses whom we've listed in their case in
7 chief, can we get them done when they're on the stand rather
8 than having to have them come back?

9 THE COURT: Generally counsel cooperate on this issue
10 for the convenience of the witnesses. And I have to leave it
11 to you to cooperate though with each other. If counsel don't
12 cooperate, you have to call the witness back. Otherwise you
13 can't go outside the scope of the direct examination.

14 MR. MOORE: Can we get them done when you call them,
15 so we don't have to call them back next week?

16 MS. VARGAS: I guess this raises another question for
17 us in terms of what your Honor would like us to do with
18 respect to rebuttal.

19 In this case, the issue of undue burden is an affirmative
20 defense, and so this hinges in some part on how we handle that
21 issue. We would not be intending to put on a defense to
22 something that they've not yet offered in our case in chief.

23 So would we be permitted and should we expect that we
24 can -- if that defense is asserted, and once we understand the
25 boundaries of that defense, then be permitted to have rebuttal

1 on those issues?

2 And it raises the concerns, it may be some of our own
3 witnesses who might need to come back to the stand.

4 THE COURT: Well, I'll try to address that in this
5 way, and I'm not sure if it will answer your question.

6 If you call a witness, whether it's one of the
7 defendant's witnesses or not, and you agree that counsel can
8 go outside the scope of direct on the cross-examination to try
9 to avoid having to bring the witness back again in connection
10 with the defendant's case, then you, of course, would have
11 your redirect and cross. And then counsel for the defense
12 would have an opportunity to do what effectively is redirect.

13 Generally -- I'll mention this too because this may be a
14 little different from what you do back east -- we don't
15 generally allow recross. So it's -- as a general rule. And
16 this is actually in our local rules. You have your direct,
17 you have your cross, you have your redirect, and that's it.

18 But, if you come to an agreement that you can go outside
19 the scope of direct examination on the cross, that's
20 effectively your direct as well, and then you have that one
21 extra turn.

22 And then I can instruct the jury regarding affirmative
23 defenses and what they can consider the evidence for and what
24 they can't consider the evidence for.

25 I guess that's really the only answer I have for you at

1 this point in time.

2 MR. MOORE: Can I ask Mary, are you concerned that
3 for lack of a better term, somehow we'd sandbag and something
4 would come up in the case and you wouldn't have the
5 opportunity to examine them again in a --

6 MS. VARGAS: That's not so much my concern, Scott.
7 My concern is more that it really blurs the burdens. The
8 burden of proof is on a different party with respect to the
9 case in chief versus the affirmative defense.

10 So we would not be inclined to allow on cross going
11 outside the scope of direct. But we understand that you
12 obviously have a right to assert and put on your case with
13 respect to the parts of the case that you bear the burden on,
14 so undue burden.

15 There's also an issue that the defenses have changed
16 rather significantly on a month-to-month basis. And so for us
17 to preemptively guess what the defenses might be and what the
18 bounds of those defenses are would prejudice us.

19 So we'd rather that we put on our case, you put on your
20 case; and then to the extent you've asserted an affirmative
21 defense, we have an opportunity to rebut that.

22 THE COURT: And all I can tell you is I have to leave
23 this in the hands of counsel. And if you can work something
24 out, that's fine. If you can't, then the defense will need to
25 call its witnesses when it's the defendant's turn.

1 MS. VARGAS: Then if we had a witness in our case in
2 chief, would we be permitted to recall that person in rebuttal
3 if they needed to address something that was raised for the
4 first time as an affirmative defense?

5 THE COURT: Sure.

6 MR. MOORE: Just so I understand, we've got to call
7 our witnesses twice because -- this is going to be really
8 tough. We've got -- you subpoenaed everybody on our side
9 pretty much for both Thursday and Friday. And they're going
10 to all show up then. And you'll make them all come back next
11 week because this is really --

12 MS. DeLAIR: Can I -- it's my understanding,
13 according to the rules, that we submit a list of who we
14 believe will be testifying and we do that a day before, so I
15 think that might alleviate some of your concerns, Scott.

16 MR. MOORE: Okay. I want to talk more about that,
17 but I understand, your Honor.

18 THE COURT: I want the lawyers to talk about that
19 among themselves. If there's anything else you need me for,
20 I'll answer your other questions if I can. Then I need to get
21 down to meet with the jury.

22 MS. VARGAS: I do have -- I'm very sorry. In terms
23 of the jury, will we know what order they're being seated in?

24 THE COURT: You will have a seating chart that will
25 lay out for you their names with stickers. And if for some

1 reason we need to replace, like excuse a juror -- we're not
2 going to have to replace any other juror. We have to do that
3 in criminal cases because we have a bigger pool.

4 But here we're going to have everybody seated, and
5 everybody will be stickered on your chart. And you will be
6 able to see exactly where they're seated, what their name is,
7 whether they're married or single, how many kids they have,
8 and where they work. It will all be on that sticker.

9 And I'm not good with names and faces, so I have to rely
10 on the stickered chart. So that will be available to you.

11 MS. VARGAS: My question is more about how we know
12 which are the 12 that are first up in the box. And then do we
13 know which order they're replaced in?

14 MR. MOORE: They'll all be in the box at one time.

15 MS. BALUS: They're all seated in the box.

16 MS. VARGAS: But all 21 won't be sitting for the
17 case. So how will we know --

18 MS. BALUS: From the end into the box. There's like
19 chairs in front of the box; if we strike those people, even if
20 they're still sitting there, they won't...

21 THE COURT: We're going to start off with 21.
22 They're all going to be over there in the box area. Some of
23 them will sit in front of the box.

24 You'll have your chart showing where they're all seated.
25 And then if somebody is excused for cause, they'll leave.

1 When nobody else has been excused for cause, then Mary
2 Roundtree, the courtroom deputy, will go back and forth for
3 you to exercise your peremptory challenges. You'll get an
4 even number of peremptory challenges. And if there's an
5 odd -- if there are 13 jurors left, I will strike the last
6 one, based upon the numerical list; just take the one off the
7 bottom. And I think it will all become very clear when you go
8 out there.

9 MS. VARGAS: Let's say after the issues with cause
10 are addressed and the peremptory challenges are handled, if
11 there are, say, 15 jurors remaining, how does that...

12 THE COURT: I'm going to let you exercise as many
13 peremptory challenges as are needed to get it down to 12 or
14 13.

15 MS. VARGAS: Okay.

16 THE COURT: Usually we try not to call more jurors
17 than we really need. So usually I think the rule is you get
18 three strikes per side.

19 But, you can exercise the number of strikes necessary to
20 get it down to 12 or 13. If it's 13, I just take off the last
21 one.

22 MS. VARGAS: So there will not be an alternate, there
23 will be 12.

24 THE COURT: There will be no alternate. We have the
25 alternate in the criminal cases but not the civil cases

1 because if we lose one, we lose one. It doesn't matter.

2 MS. VARGAS: Thank you very much.

3 THE COURT: I will see you in the courtroom.

4 (Concluded in chambers at 9:25 a.m.)

5 (Jury selected and sworn.)

6 THE COURT: Ladies and gentlemen of the jury, I am
7 now going to be giving you some instructions about this case
8 and about your duties as jurors. At the end of the trial I'll
9 give you more instructions. I may give you some instructions
10 during the trial. All instructions, those I give you now and
11 those I give you later, whether they are in writing or given
12 to you orally, are equally important and you must follow them
13 all.

14 As I mentioned earlier, this is a civil case brought by
15 the plaintiff, Michael Argenyi, against the defendant,
16 Creighton University.

17 The defendant is a place of public accommodation for
18 purposes of Title III of the Americans with Disabilities Act
19 which we also refer to as the ADA. And Creighton is a
20 recipient of federal financial assistance for purposes of
21 Section 504 of the Rehabilitation Act of 1973 that I will
22 refer to as the Rehabilitation Act.

23 The plaintiff has a disability as the term is defined by
24 the Americans with Disabilities Act and the Rehabilitation
25 Act.

1 The plaintiff was admitted to the defendant's medical
2 school and alleges that the defendant violated his rights
3 under the Americans with Disabilities Act and the
4 Rehabilitation Act by failing to provide him with
5 accommodations and auxiliary aids and services he claims were
6 necessary to ensure effective communication.

7 The plaintiff also alleges that the defendant acted with
8 deliberate indifference when it denied him the auxiliary aids
9 and services he requested.

10 Creighton University denies Mr. Argenyi's allegations and
11 asserts that it provided him reasonable and necessary
12 accommodations and auxiliary aids and services and did not
13 discriminate against him in any way. The defendant asserts as
14 its affirmative defense that providing the plaintiff with the
15 auxiliary aids and services he requested would have posed an
16 undue burden on it.

17 It will be your duty to decide from the evidence which
18 party is entitled to your verdict. Your verdict -- excuse me.
19 Your duty is to decide what the facts are from the evidence.
20 You are allowed to consider the evidence in light of your own
21 observations and experiences.

22 After you have decided what the facts are, you will have
23 to apply those facts to the law which I give you in these and
24 in my other instructions. That is how you will reach your
25 verdict.

1 Only you will decide what the facts are. However, you
2 must follow my instructions, whether you agree with them or
3 not. You have taken an oath to follow the law that I give you
4 in my instructions.

5 In deciding what the facts are, you may have to decide
6 what testimony you believe and what testimony you do not
7 believe. You may believe all of what a witness says or only
8 part of it or none of it.

9 In deciding what testimony to believe, consider the
10 witness's intelligence, their opportunity to have seen or
11 heard the things they testify about, their memories, any
12 reasons they might have to testify a certain way, how they act
13 while testifying, whether they said something different at
14 another time, whether their testimony is generally reasonable,
15 and how consistent their testimony is with other evidence you
16 believe.

17 Do not let sympathy or your own likes or dislikes
18 influence you. The law requires you to come to a just verdict
19 based only on the evidence, your common sense, and the law
20 that I gave you in my instructions, and nothing else.

21 Nothing I say or do during this trial is meant to suggest
22 what I think of the evidence or what I think your verdict
23 should be.

24 When I use the word evidence, I mean the testimony of
25 witnesses, documents and other things I receive as exhibits,

1 facts that I tell you the parties have agreed are true, and
2 any other facts that I tell you to accept as true.

3 Some things are not evidence. I will tell you what is
4 not evidence.

5 Lawyers' statements, arguments, questions, and comments
6 are not evidence. Documents or other things that might be in
7 court or talked about but that do not -- that I do not receive
8 as exhibits are not evidence.

9 Objections are not evidence. Lawyers have a right and
10 sometimes a duty to object when they believe something should
11 not be part of the trial. Do not be influenced one way or the
12 other by objections. If I sustain a lawyer's objection to a
13 question or an exhibit, that means the law does not allow you
14 to consider that information. When that happens, you must
15 ignore the question or the exhibit and must not try to guess
16 what the information might have been.

17 Testimony and exhibits that I strike from the record or
18 tell you to disregard are not evidence, and you must not
19 consider them.

20 Anything you see or hear about this case outside the
21 courtroom is not evidence and you must not consider it.

22 Also, I might tell you that you can consider a piece of
23 evidence for one purpose only and not for any other purpose.
24 If that happens, I will tell you what purpose you can consider
25 the evidence for and what you are not allowed to consider it

1 for.

2 You need to pay close attention when I give an
3 instruction about evidence that you can consider for only
4 certain purposes because you might not have that instruction
5 in writing later in the jury room.

6 Some of you may have heard the terms direct evidence and
7 circumstantial evidence. You should not be concerned with
8 those terms because the law makes no distinction between the
9 weight to be given to direct and circumstantial evidence.

10 During the trial I will sometimes need to talk privately
11 with the lawyers. I may talk with them here at the bench
12 while you are in the courtroom; or I may call a recess and let
13 you leave the room while I talk with the lawyers.

14 Either way, please understand that while you're waiting,
15 we're working. We have these conferences to make sure that
16 the trial is proceeding according to the law and to avoid
17 confusion or mistakes. We will do what we can to limit the
18 number of these conferences and to keep them as short as
19 possible.

20 At the end of the trial you will have to make your
21 decision based on what you recall of the evidence. You will
22 not have a written copy of the testimony to refer to. Because
23 of this, you have to pay close attention to the testimony and
24 other evidence as it is presented here in the courtroom.

25 If you wish, however, you may take notes to help you

1 remember what witnesses say. If you do take notes, do not
2 show them to anyone until you and your fellow jurors go to the
3 jury room to decide the case after you have heard and seen all
4 of the evidence. And do not let taking notes distract you
5 from paying close attention to the evidence as it is
6 presented.

7 The clerk will provide each of you with a pad of paper
8 and a pen or pencil. At each recess, leave them in the jury
9 room. When you leave at night, your notes will be locked up
10 and will not be read by anyone.

11 To make sure this trial is fair to all parties, you must
12 follow these rules:

13 First, do not talk or communicate among yourselves about
14 this case or about anyone involved with it until the end of
15 the case when you go to the jury room to consider your
16 verdict.

17 Second, do not talk with anyone else about the case or
18 about anyone involved with it until the trial has ended and
19 you have been discharged as jurors.

20 Third, when you are outside of the courtroom, do not let
21 anyone tell you anything about this case or about anyone
22 involved with it until the trial has ended and your verdict
23 has been accepted by me. If someone tries to talk to you
24 about this case during the trial, please report it to my
25 courtroom deputy.

1 Fourth, during the trial, do not talk with or speak to
2 any of the parties, lawyers, or witnesses in this case, not
3 even to pass the time of day. It is important not only that
4 you do justice in this case, but also that you act
5 accordingly. If a person from one side of the lawsuit sees
6 you talking to a person from the other side, even if it is
7 just about the weather, that might raise a suspicion about
8 your fairness.

9 So when the lawyers, parties, and witnesses do not speak
10 to you in the halls or on the elevator or the like, you
11 understand they are not being rude. They know they are not
12 supposed to talk to you while the trial is going on, and they
13 are just following the rules.

14 Fifth, you may need to tell your family, close friends,
15 and other people that you are part of this trial. You can
16 tell them when you have to be in court, and you can warn them
17 not to ask you about this case, tell you anything they know or
18 think they know about the case, or talk about this case in
19 front of you.

20 But you must not communicate with anyone or post
21 information about the parties, witnesses, participants,
22 claims, evidence, or anything else related to this case. You
23 must not tell anyone anything about the jury's deliberations
24 in this case until after I accept your verdict or until I give
25 you specific permission to do so.

1 If you talk about the case with someone besides the other
2 jurors during deliberations, it looks as if you might already
3 have reached a decision or that you might be influenced in
4 your verdict by their opinions. That would not be fair to the
5 parties, and it might result in the verdict being thrown out
6 and the case having to be tried over again.

7 During the trial, while you are in the courthouse, and
8 after you leave for the day, do not give any information to
9 anyone by any means about this case. For example, do not talk
10 face to face, use any electronic devices such as a telephone,
11 cell phone, smart phone, BlackBerry, PDA, computer or
12 computer-like device. Likewise, do not use the Internet or
13 any Internet service, do not text or send instant messages, do
14 not go on an Internet chat room, blog, or other Web site such
15 as Facebook, My Space, YouTube or Twitter. In other words, do
16 not communicate with anyone about the case except for the
17 other jurors during deliberations until I accept your verdict.

18 Sixth, do not do any research on the Internet, in
19 libraries, newspapers, or otherwise, and do not investigate
20 this case on your own. Do not visit or view any place
21 discussed in this case and do not use the Internet or other
22 means to search for or view any place discussed in the
23 testimony. Also do not look up any information about the
24 case, the law, or the people involved, including the parties,
25 the witnesses, the lawyers or me.

1 Seventh, do not read any news stories or Internet
2 articles or blogs about the case or anyone involved with it,
3 do not listen to any radio or television reports about the
4 case or anyone involved with it. Until the trial is over you
5 may want to avoid reading newspapers and let them accumulate
6 until the trial is finished.

7 The parties have a right to have you decide their case
8 based only on evidence admitted here in court. If you
9 research, investigate, or experiment on your own, or get
10 information from other sources, your verdict might be
11 influenced by inaccurate, incomplete, or misleading
12 information. Witnesses in court take an oath to tell the
13 truth and the accuracy of their testimony is tested through
14 cross-examination.

15 All of the parties are entitled to a fair trial and an
16 impartial jury, and you have to conduct yourselves in a way
17 that assures the integrity of the trial process. If you
18 decide a case based on information not admitted in court, you
19 will deny the parties a fair trial. You will deny them
20 justice. You have taken an oath to follow the rules and you
21 must do so. If you do not, the case may have to be retried or
22 you could be held in contempt of court and possibly punished.

23 Eighth, do not make up your mind during the trial about
24 what your verdict should be. Keep an open mind until after
25 you and your fellow jurors have discussed all the evidence.

1 The trial will proceed in the following manner: First,
2 the plaintiff's lawyer may make an opening statement. Next,
3 the defendant's lawyer may make an opening statement. An
4 opening statement is not evidence but is a summary of the
5 evidence the lawyers expect you will see and hear during the
6 trial.

7 After opening statements, the plaintiff will then present
8 evidence. Counsel for the defendant will have the chance to
9 cross-examine the plaintiff's witnesses. After the plaintiff
10 has finished presenting his case, the defendant may present
11 evidence and plaintiff's counsel will have a chance to
12 cross-examine the defendant's witnesses.

13 After you've seen and heard all the evidence from all
14 sides, the attorneys will make closing arguments that
15 summarize and interpret the evidence. Just as with opening
16 statements, closing arguments are not evidence.

17 After the closing arguments I will instruct you further
18 on the law. And you will go to the jury room to deliberate
19 and decide your verdict.

20 When we take a recess, you'll be shown to the jury room
21 which is open for your use. At the end of each recess during
22 the day, please return and assemble in the jury room. The
23 courtroom deputy will come for you when court is ready to
24 resume. No one may enter the jury room other than jurors and
25 court employees.

1 If you need to communicate with me during trial, please
2 do so only in writing by preparing a note that is signed and
3 dated by you or by calling my chambers -- and we'll give you
4 the phone number for the chambers when you return on Thursday.
5 And a court employee can pick up the note from you.

6 Now, you have gone through the voir dire process as well
7 as our orientation downstairs. You have heard the preliminary
8 instructions.

9 And now you are going to be taking a break before we
10 actually proceed with the opening statements and the evidence
11 in this case.

12 As I told you downstairs, we will do that starting on
13 Thursday morning at nine o'clock. So, you will all need to
14 gather in the jury assembly room before nine o'clock on
15 Thursday so we can start promptly at 9:00 on Thursday. And we
16 will be continuing on Thursday and Friday, and then starting
17 again next Tuesday morning.

18 And is there anything that I need to discuss with counsel
19 before I excuse the jury for the day?

20 MS. VARGAS: No, your Honor.

21 MR. MOORE: Nothing for the defendant, your Honor.

22 THE COURT: Very good. Thank you very much for your
23 time and attention this morning. Enjoy the rest of your day.
24 You have the day off from court tomorrow. And I will see you
25 again at 9:00 in the morning on Thursday. Thank you.

1 We're in recess.

2 (Jury out at 11:38 a.m.)

3 THE COURT: Now, anything we need to discuss outside
4 the presence of the jury before I begin preparing for my
5 hearing tomorrow?

6 MS. VARGAS: Your Honor, if I could, I guess, make a
7 motion to preclude the defense counsel from discussing the
8 details of his disability during the course of this trial.
9 This trial is not about him. And any efforts to discuss the
10 circumstances relating to his own disability would prejudice
11 the jury or would be an improper attempt to seek sympathy from
12 them or change their views of the case. I would suggest I
13 won't discuss my personal business, that Mr. Moore not discuss
14 his personal business.

15 THE COURT: It's apparent to the jury that Mr. Moore
16 is in a wheelchair. And I don't think there was anything that
17 Mr. Moore said that would be likely to prejudice the jury.
18 But Mr. Moore, I doubt there's going to be any need for you to
19 make further references to your history.

20 MR. MOORE: I mean, I don't think so. Lawyers are
21 allowed to -- I mean, I am who I am, you know, if -- yeah, I
22 would never use that to try to influence the jury, let's put
23 it that way.

24 But, there was -- I guess it's a reference to a person
25 who is a quadriplegic, and I was just mentioning my

1 disability. I don't intend to use it in any manner, but I
2 can't promise the Court I'll never say anything about me
3 through the trial.

4 So -- but, yeah, I certainly never intended to and would
5 never use it to try to influence the jury.

6 THE COURT: The comments made during voir dire
7 frankly were not out of the ordinary from what I've heard
8 other lawyers mention during voir dire. Sometimes they do
9 tell the jury a little bit about themselves.

10 But that's probably going to be unnecessary from this
11 point forward, so I will grant your motion.

12 Anything further?

13 MS. VARGAS: Thank you.

14 One further question, it's more housekeeping. What time
15 will court be concluding each day? If we have a witness who
16 finishes at four o'clock, should we plan to bring somebody
17 right on, or how would you like to handle those kinds of
18 concerns?

19 THE COURT: Obviously I want to make the best use of
20 the Court's time and the jury's time and everyone's time.

21 Don't ever feel that you need to stretch a witness to
22 fill up time because you don't have a witness ready to come in
23 for the rest of the day.

24 I have seen lawyers do that when judges have said, well,
25 unless you have the next witness ready, you're out of here.

1 We don't do that.

2 So I would just ask for the lawyers to cooperate with
3 each other and to get their witnesses lined up in such a
4 manner that it uses the jury's time to the best benefit.

5 I had told the jury that our usual day will be starting
6 at nine o'clock in the morning, take a mid-morning break
7 probably around 10:30, 15-minute break; they'll always get an
8 hour for lunch; now and then, they get longer because
9 sometimes my staff schedules in a one o'clock hearing on the
10 schedule. We'll have a mid-afternoon break, and we will plan
11 to stop promptly at five o'clock each afternoon.

12 We do that out of a courtesy to the jury and to staff;
13 also because our courthouse security tends to leave -- well,
14 they do leave at 5:30. And the parking garages also close
15 down not long after that.

16 So I don't want to go past five o'clock. Certainly if
17 you have somebody on the stand and it takes five minutes to
18 wrap it up, we may wrap it up. If your testimony ends at 4,
19 I'd like to use that next hour. I would like to keep the case
20 moving along, but that's about as much guidance as I can give
21 you.

22 MS. VARGAS: The one situation I'd like to just bring
23 to the Court's attention is that a hostile witness for
24 plaintiff, one of the defendant's former employees, is not
25 available until Tuesday. And so while we think that will fall

1 perfectly with the timing of the case, should we reach a point
2 Friday afternoon where we're ready to move on to him and he's
3 not available, we might ask the Court if we could end a few
4 minutes early out of deference to the fact that he's not
5 available.

6 THE COURT: I'm a little confused about who this
7 person is hostile to -- he's hostile to the plaintiff or
8 hostile to Creighton?

9 MS. VARGAS: Hostile to plaintiff. Dr. Hansen was an
10 employee of Creighton University. I understand recently he's
11 no longer employed by Creighton, but I understand from
12 communication with Mr. Moore he's not available until Tuesday.

13 And while I think that that's not going to be a problem,
14 if we reach a point where we've gone through all of our
15 witnesses except for Dr. Hansen, then he's not going to be
16 available Friday.

17 THE COURT: So he is likely to be your last witness.
18 You are telling me you think you will have your case in
19 Thursday and Friday but for Dr. Hansen.

20 MS. VARGAS: We think we're likely to have one or two
21 witnesses on Tuesday and rest on Tuesday.

22 THE COURT: And Dr. Hansen will be one of those.

23 MS. VARGAS: Yes.

24 THE COURT: Thank you for letting me know that.

25 Anything further?

1 MR. MOORE: Nothing from the defendant.

2 THE COURT: Very good. Thank you.

3 We'll see you on Thursday morning.

4

5 (Adjourned at 11:44 a.m.)

6

7

8

9 I certify that the foregoing is a correct transcript from
10 the record of proceedings in the above-entitled matter.

10

11 /s Brenda L. Fauber
12 Brenda L. Fauber, RDR, CRR

7-21-14
Date

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